No. 14,778

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IDA MAE HERMANN, IRVING E. HERMANN, ROBERT M. SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICHARDS, GEORGE PATTERSON, LEONARD ROSEN, ORVILLE KELMAN, and CAPTAIN G. D. THOMPSON,

Appellants,

vs.

CIVIL AERONAUTICS BOARD,

Appellee.

Appeal From the United States District Court for the Southern District of California.

BRIEF FOR APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

RULES

STATUTES

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Appeal From the United States District Court for the Southern District of California.

BRIEF FOR APPELLANTS.

Jurisdictional Statement.

This is an appeal by appellants, respondents below, from an order of the United States District Court for the Southern District of California, Central Division, enforcing ten administrative *subpoenas duces tecum* served upon appellants in the course of an administrative proceeding pending before a hearing examiner of appellee, the Civil Aeronautics Board, the petitioner below. The order of the District Court required the ten appellants to appear before the hearing examiner and produce all of the documents sought in ten administrative subpoenas.

The jurisdiction of the District Court was based upon Section 644(d) of Title 49 of the United States Code. The petition of appellee to enforce administrative sub-

poenas was filed and an order to show cause directed to appellants was issued on March 29, 1955. [R. 3, 67.] Appellants filed their return to the order to show cause and their answer to the petition of appellee on April 6, 1955. [R. 68.]

The final order of the District Court enforcing subpoenas was entered on May 17, 1955. [R. 144.] Appellants filed their Notice of Appeal on May 19, 1955 [R. 146] and the record was docketed in this court. The jurisdiction of this court is based on Section 1291 of Title 28 of the United States Code and Rule 81(a)(3) of the Federal Rules of Civil Procedure.

Statement of the Case.

This appeal is concerned with the validity of ten administrative subpoenas issued and served by the appellee, the Civil Aeronautics Board, hereinafter called "the Board," in the course of an administrative proceeding pending before a Hearing Examiner of the Board. The administrative proceeding referred to is an enforcement proceeding brought by the Compliance Section of the Board entitled, "In the Matter of Great Lakes Airlines, Inc., *et al.,* Docket No. 6908," hereinafter called "Docket 6908."

The nineteen respondents in Docket 6908 consist of two air carriers, Great Lakes Airlines, Inc., hereinafter called "Great Lakes," and Currey Air Transport Limited, hereinafter called "Currey," licensed by the Board to engage in interstate air transportation as non-scheduled air carriers; twelve ticket agencies hereinafter called "the Ticket Agency Respondents" which engage in the sale of tickets to the public for air transportation to be performed by various non-scheduled airlines, including respondents Great Lakes and Currey; Nevada Aero Trades Company,

a partnership engaged in the leasing of aircraft; Air International, Inc.; and Great Lakes Airlines Agency, Inc.; appellants Ida Mae Hermann and Irving E. Hermann are also individual respondents in Docket 6908. The issues in Docket 6908 relate to alleged violations by the above named respondents of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 401, *et seq.*) hereinafter called "the Act," and the Board's regulations promulgated thereunder. These alleged violations relate to (1) frequency and regularity of flight operations; (2) acquisition and maintenance of control by respondents Ida Mae Hermann and Irving E. Hermann over Currey and the Ticket Agency Respondents without prior Board approval; and (3) various ticketing practices engaged in by the Ticket Agency Respondents. There are no issues relating to safety in the administrative proceeding.

The appellants, Ida Mae Hermann, Irving E. Hermann, George Patterson, H. C. Richards, Robert M. Smith, Captain G. D. Thompson and Leonard Rosen, are officers or employees of the respondent companies in Docket 6908. The appellants Harold Shein, Orville Kelman and M. B. Scott, are independent contractors who perform accounting or advertising functions for some of the respondent companies.

The Hearing Examiner ordered appellants to produce all of the documents called for in each of the subpoenas, over the objections of the appellants and the respondents in Docket 6908. The Examiner's action was affirmed by the Board. [R. 61.] The appellants having failed to produce the documents, the Board instituted this proceeding in the District Court by filing its Petition to enforce administrative subpoenas pursuant to the express provisions of Section 644(d) of The Act. [R. 3.] The District Court

issued its Order to Show Cause directed to the appellants. [R. 67.] The appellants replied thereto and a hearing was held before the District Court on April 5 and 6, 1955. The cause was heard entirely on affidavits. The District Court, after limiting counsel for appellants and the Board to statements of their respective positions, issued an Order on April 7, 1955 [R. 115], hereinafter called "The Inspection Order," staying enforcement of the subpoenas and continuing the cause to April 18, 1955, upon condition that appellants permit inspection and copying of the documents sought in the subpoenas served upon appellants Ida Mae Hermann, Irving E. Hermann, Robert M. Smith, H. C. Richards, George Patterson and Captain G. D. Thompson [R. 39-50, 54-56, 60], excepting only the personal income tax returns called for in the subpoenas served upon appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith. [R. 40, 45, 48.]

Pursuant to the District Court's inspection order, six Board employees and agents inspected and copied the documents called for in the subpoenas, commencing April 7, 1955 through April 15, 1955. The hearing was resumed before the District Court on April 18, 1955, at which time the Board made no further showing of relevancy or materiality of the documents sought in the subpoenas, but instead presented affidavits to the District Court, without notice to appellants, which purported to show that the appellants had not complied with the inspection order of the District Court. [R. 117-125.] Thereupon, and without further notice or argument on the merits, the District Court ordered all of the subpoenas enforced, exactly as written [R. 126] excepting, however, the subpoena served upon appellant Leonard Rosen which was not pressed by the Board. [R. 57.]

The appellants filed a petition for rehearing, which was argued on May 9, 1955. Counsel for appellants and the Board were permitted, for the first time, to present argument on the factual and legal questions involved. Appellants presented the arguments and objections to the subpoenas which had been raised before the Hearing Examiner of the Board. Appellants also argued that substantially all of the documents sought in the subpoenas had been inspected and copied or photographed by representatives of the Board pursuant to the District Court's inspection order and that the Board had many of the documents in its possession. The Board made no showing of relevance or materiality of the documents sought in the administrative subpoenas at this time.

The cause was taken under submission and on May 12, 1955 the District Court issued its Memorandum for Order Enforcing Subpoenas [R. 143], wherein the Court denied the motion for rehearing, vacated the original order for enforcement of the subpoenas and ordered the subpoenas enforced as requested. The final Order Enforcing Subpoenas required appellants to appear before the hearing Examiner and produce the documents sought in the subpoenas commencing May 31, 1955 through June 14, 1955. The order was docketed and entered on May 17, 1955. [R. 144.]

On May 18. 1955, the District Court issued an order Staying Its Order Enforcing Subpoenas pending determination by this Court of a timely motion by appellants for stay pending appeal. [R. 154.] The appellants filed their Notice of Appeal on May 19, 1955 [R. 146], and filed a timely motion before this Court for a stay pending appeal. Appellants' motion for stay was granted by this Court on May 29, 1955. [R. 161.]

Specification of Errors Relied Upon.

1. The District Court erred in shifting the burden of proving relevance and materiality of the documents sought in the administrative subpoenas from the Board, the proponent of the subpoenas, to appellants.

2. The Court's Order Enforcing Subpoenas was erroneous because the Board failed to demonstrate that the documents sought in the administrative subpoenas, or any of them, were relevant or material to the issues in Docket No. 6908.

3. The Court's Order enforcing the administrative subpoenas was erroneous because the subpoenas contain no subject matter designation or limitation.

4. The Court's Order enforcing the administrative subpoenas was erroneous because the administrative subpoenas were issued in an adversary proceeding with designated issues.

5. The District Court erred by failing to consider the burden imposed upon appellants and the respondents in Docket 6908 in producing the documents called for in the administrative subpoenas.

6. The Court erred by failing to consider the fact that the production of the documents called for in the administrative subpoenas would deprive the respondents in Docket 6908 of the use of business and financial records vitally needed in the day-to-day conduct of their business.

7. The Court's order was erroneous because a substantial number of the documents sought in the subpoenas are within the possession and control of the Board.

8. The Order of the District Court requiring the production of the personal income tax returns and personal bank records of appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith was erroneous because the Appellee made no showing of relevance or materiality of the said personal income tax returns or personal bank records and said order constituted an unreasonable invasion of the rights of privacy of these appellants.

Summary of Argument.

The principal issue raised by this appeal is the validity of the administrative subpoenas issued by the Board. Granting the authority of the Board to issue the subpoenas as well as the amenability of appellants to the subpoenas, nevertheless, application of accepted legal principles and authorities shows that the administrative subpoenas are invalid because:

1. The administrative subpoenas are too sweeping in scope.

2. Compliance with the administrative subpoenas would cast an unreasonable burden upon appellants.

3. The Board, at the time the subpoenas were issued, had, and continues to have, in its possession, many of the documents sought by the subpoenas.

Appellants will also show below that the Board must sustain the burden of proving the relevance and materiality of the documents sought in the subpoenas, and has failed to do so. The District Court erroneously placed the burden of proving irrelevance and immateriality upon the appellants. The District Court also failed to discharge the functions of a trial court in a subpoena enforcement case.

ARGUMENT.

I.

The Subpoenas Are Invalid and Should Not Be Enforced.

A. The Subpoenas and the Effect of Producing the Documents.

This brief cannot be comprehensible to the Court without summarizing the subpoenas themselves, to demonstrate that they are so sweeping in scope and impose such a burden upon appellants as to render the subpoenas invalid and unenforceable. The ten administrative subpoenas served upon the ten appellants in the proceeding, which were ordered enforced by the District Court, are set forth in full in the transcript of record on appeal. [R. 39-60.] For convenience, the subpoenas are summarized in the appendix to this brief. (*Infra,* pp. 2-6.)

It is difficult, indeed, to summarize the sweep of the ten subpoenas at issue in this proceeding. The period covered by most of the subpoenas is 38 months.[1] The comprehensiveness of the individual subpoenas, particularly those directed to Great Lakes, Currey, Air International, Inc., Nevada Aero Trades Company and Great Lakes Airlines Agency, Inc.,[2] demonstrates that these subpoenas represent the culmination of studied efforts on the part of zealous and imaginative administrative agents to require the production of all records, books and documents of or concerning the respondent companies in Docket No.

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[1]The Scott subpoena is unrestricted as to time, while the Richards, Patterson, Kelman and Thompson subpoenas cover a period of 34 months commencing in May, 1952. [R. 51-53, 54-56, 58-60.]

[2]These subpoenas were issued to Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith. [R. 39, 43, 47.]

6908. The physical burden of producing the documents is sufficient ground to deny enforcement of the subpoenas. *Bank of America v. Douglas,* 105 F. 2d 100 (C. A.-D. C. 1939).

It is possible to analyze the effect of producing the documents sought in the subpoenas in several ways. Our analysis is in terms of the number of documents sought, the number of documents which must be examined to locate and segregate the documents sought, as well as the time and personnel required to do the job.

The record brings to light the following undisputed facts which show the effect upon the appellants and the respondents in Docket No. 6908 of producing the documents demanded in the subpoenas:

Great Lakes and Currey are non-scheduled air carriers engaging in the domestic common carriage of passengers pursuant to licenses issued by the Board. Considerable documentation is involved in conducting business as an air carrier. These carriers are required to adhere to the extensive record keeping and reporting requirements of (1) the Civil Aeronautics Administration, with respect to safety and operational matters, and (2) the Board with respect to economic matters. [R. 110-112, 133-134, 139.] Some 50 to 75 documents are required in connection with each flight operated. [R. 110.] Great Lakes, in addition, has an extensive maintenance division which performs overhaul and maintenance services upon the aircraft owned or operated by Great Lakes, Currey and other airline companies. [R. 110.]

Applying the foregoing facts to the operations of Great Lakes, certain facts become apparent. Great Lakes has

approximately 75 employees. [R. 110.] Production of all of the individual personnel and payroll records and vouchers for a period of 38 months, where there are frequent personnel changes, calls for a substantial number of documents, whose relevance is dubious at best.

Great Lakes issued approximately 2500 tickets per month. Since one subpoena calls for the production of three coupons for every ticket sold in the months of June and November for three years, 1952 through 1954, inclusive, it can readily be seen that Great Lakes must produce 45,000 ticket coupons to satisfy the subpoena. [R. 41.][3] However, the matter is not that simple, as the subpoena calls for all coupon copies of tickets actually sold to the public during the months of June and November in each of these three years. The ticket coupons are not filed by dates sold, but instead are filed by date of flight. Since many passengers purchase tickets in advance of their flight, it would be necessary to search through the ticket coupons for two or three months following the months named in the subpoena. The best estimate of the time involved in producing these tickets in response to the subpoena is ten weeks and then only if a trained person were devoted to this particular job. [R. 111-112.]

The Board has not made any particular showing of any kind whatsoever why this great number and bulk of ticket coupons are required for its evidentiary purposes. It seems anomalous to require Great Lakes to produce all of these ticket coupons in the absence of such a showing.

A comparable problem with respect to the production of ticket coupons exists in the case of Currey, which is

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[3]The subpoena also calls for many specific tickets [R. 42-43] and for the flight, auditor and agent coupon of each ticket requested.

called upon to produce all of the coupons for tickets sold during the same months. [R. 48.] In fact, an analysis of the flights operated by Great Lakes and Currey between Los Angeles and New York[4] during the calendar years 1952, 1953 and 1954 reveals that Currey operated more flights than Great Lakes, with the obvious result that the burden placed upon Currey would be at least equal to that placed upon Great Lakes. [R. 36-38.]

Another item that is susceptible to ready analysis is the request for all cancelled checks and bank statements of five respondent companies for a 38-month period. In the case of Great Lakes, a recent inspection showed that some 300 checks per month were issued. [R. 111.] This would mean that more than 11,000 cancelled checks need be produced by Great Lakes. It was estimated that the number of bank statements and cancelled checks demanded from Great Lakes, Air International, Inc., Nevada Aero Trades and Ida Mae Hermann, is 25,000 items. [R. 111.] Again, the Board has made no particular showing of relevance, materiality or evidentiary need for all of these documents, or any of them.

Each of the respondent companies in Docket 6908 is required to produce all of its general ledgers and all subsidiary books and ledgers, and all supporting documents to the entries in said books and ledgers for a period of 38 months, Great Lakes maintains a fairly elaborate system of books and its files contain supporting information for every ticket sold. Some 200,000 documents would have to be produced in order for Air International, Inc., Nevada Aero Trades Company and Great Lakes to

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[4]The only flight data of record relates to Los Angeles-New York flights.

comply with this phase of the subpoena. A trained person would require approximately two months to produce all of these documents. [R. 111.] The Board again has failed to show any particular reason for the production of any particular set of books or ledgers or supporting documents, or for all of them.

The subpoenas call for the production of all correspondence, contracts, agreements and options between the nineteen respondents in Docket 6908 over a 38-month period, as well as correspondence between any of them and Robert M. Smith, Arthur R. Currey, and M. B. Scott, Inc.[5] No estimate has been made of the number of documents that need be produced in answer to these demands. However, it is clear that all of the facilities of 22 entities and individuals need be searched with great care to locate all of the documents called for. [R. 112-113.] These companies and individuals, who are engaged in various phases of the air transportation business as well as related and unrelated businesses, should not be required to respond to such a shotgun demand. A subpoena of this type is unreasonable and will not be enforced. *Hale v. Henkel,* 201 U. S. 43, 76-77 (1906).

Appellant Ida Mae Hermann has estimated that the appellants in this proceeding would be required to search through 1,000,000 documents to locate and segregate the documents sought in the subpoenas. [R. 109.] While we recognize that the figure of 1,000,000 documents is an estimate, nevertheless it appears to be fully substantiated by a check of the individual requests contained in the subpoenas.

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[5]None of these three individuals and entities are Respondents in Docket 6908.

It is equally clear that businesses of the type described above cannot function properly without the business records called for in the subpoenas. [R. 114-115.] No attempt has been made to estimate the bulk of the documents sought. It must be clear from the foregoing analysis, however, that a vast bulk of documents need be produced and a great physical burden placed upon the appellants in segregating and delivering up the documents.

B. Availability of the Documents to the Civil Aeronautics Board.

Section 487(e) of the Act gives the Board sweeping inspection powers. Most, if not all, of the documents sought in the subpoenas served upon the officers, agents and employees of Great Lakes, Currey, Air International, Inc., Great Lakes Airlines Agency, Inc., and Nevada Aero Trades Company, could have been examined by the Board at any time prior to the institution of Docket 6908. This section of the statute provides as follows:

> "(e) The Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; and it may employ special agents or auditors, who shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memoranda. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this chapter, to persons having control over any air carrier, or affiliated with any air carrier within the meaning of section 5(8) of this title."

The Board has never caused its agents and employees to inspect the documents sought in the subpoenas. There is no allegation that the respondents in Docket No. 6908, or the appellants in this proceeding, have withheld access to these documents from the Board's agents and employees. In fact, it is uncontradicted that routine inspections of the Great Lakes facilities were made by the Board in 1954, and prior thereto, in connection with other matters, without any objection whatsoever on the part of appellants or the respondents in Docket No. 6908. [R. 109.]

The District Court's inspection order of April 7, 1955 required appellants to make all of the documents called for in the subpoenas served upon the officers, agents and employees of Great Lakes, Currey, Great Lakes Airlines Agency, Inc., Air International, Inc., and Nevada Aero Trades Company, available for inspection, copying and photographing by the agents and employees of the Board, with the single exception of personal income tax returns. [R. 116.] Six representatives of the Board has unrestricted access to these documents for a period of eight days. [R. 129-142.] Nevertheless, no specific showing of relevancy or materiality of any specific document or of any group of documents was made by the Board prior or subsequent to this inspection. It would appear eminently reasonable to require the Board to make a showing of relevance and materiality once an actual inspection of the very documents sought in the subpoenas had been made by the Board.

C. Many of the Documents Are in the Possession of the Board.

Reference has previously been made to the fact that Great Lakes and Currey are required to file and in fact do file many documents with the Board and the Civil Aeronautics Administration (*supra,* p. 9). The affidavits of Ida Mae Hermann and the affidavit of Robert M. Smith, which are uncontradicted, reveal that all of the balance sheets and profit and loss statements of Great Lakes and Currey, which are called for in the subpoenas, have been filed with the Board. [R. 111, 134, 139.] In fact, Great Lakes and Currey retain only duplicates of the original documents filed with the Board as part and parcel of regular quarterly reports filed pursuant to applicable Board regulations. [R. 134, 139.]

The uncontradicted affidavits of Ida Mae Hermann also demonstrate that all of the Great Lakes advertising materials called for in the subpoena addressed to Mrs. Hermann have been filed with the Board as part and parcel of regular quarterly reports filed with the Board pursuant to applicable Board regulations. [R. 112, 133-134.][6]

The subpoena issued to Appellant George Patterson calls for the production of the aircraft maintenance logs for aircraft owned or operated by Great Lakes and Currey. [R. 56.] The uncontradicted affidavit of Ida Mae Hermann demonstrates that most of the pertinent data contained in the aircraft maintenance logs of aircraft owned or operated by Great Lakes is reported to the Civil Aeronautics Board in regular quarterly reports, while such data as is contained in the aircraft mainte-

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[6]Other than a minor item in the amount of $7.00. [R. 133.]

nance logs and not reported to the Civil Aeronautics Board pertains to safety matters which are not at issue in this proceeding. [R. 113-114.]

It is self evident that documents which are in the possession of the Board need not be produced. *Application of Linen Supply Companies,* 15 F. R. D. 115, 119 (D. C.-S. D. N. Y., 1953).

D. Relevance and Materiality of the Documents.

The record reveals that the Board has not shown the relevance or materiality of any of the documents sought in the administrative subpoenas. The Board, instead, filed its Complaint in Docket 6908 as Exhibit A to its Petition to Enforce Subpoenas filed in the District Court. The Board chooses to rely entirely on the issues in Docket 6908 as spelled out in its Complaint to establish the relevance and materiality of all of the documents sought in the administrative subpoenas.

The position taken by the Board raises this issue for determination by this Court: Does the Complaint filed by the Board in Docket 6908 sufficiently establish the relevance and materiality of all of the documents sought in the administrative subpoenas, or the relevance and materiality of any particular document or documents sought in the administrative subpoenas? This question must be determined in the light of the fact that (1) the Board has failed to exercise its unquestioned inspection powers pursuant to section 487(e) of the Act; (2) the Board has failed to show the relevance or materiality of any of the documents sought in the administrative subpoenas after examining most of the documents pursuant to the inspection order of the District Court of

April 7, 1955; and (3) the Board has many of the documents sought in the subpoenas in its possession.

It would appear to be a minimal requirement that the Board make a stronger and more precise showing of materiality and relevancy of the documents sought. This is particularly true in view of the tremendous sweep of the subpoenas in terms of the time period covered and the number and variety of documents sought. Notwithstanding these background facts, the Board has failed or neglected to make this basic showing.

A similar issue was faced in *Goodyear Tire & Rubber Co. v. National Labor Relations Board,* 122 F. 2d 450 (C. A. 6, 1941), where the case was remanded and the District Court directed to consider issues relating to relevance and materiality. The demand there was for the cards in an employee card index. The Court held that the fact that some of the cards were relevant to the issues in the administrative proceeding, and some of the other cards might be relevant to the issues in the proceeding, "does not warrant a demand for the whole." While respondent's "conclusion that this index is not relevant is not final, at least some evidence must be offered to show that it is wrong." (122 F. 2d 453.)

The respondents in Docket 6908 and the appellants in this appeal have argued that the documents sought are irrelevant and immaterial to the issues. The Board has failed or refused to show that the documents are relevant. Under the doctrine of the *Goodyear* case, appellants must prevail unless the Board sustains the burden of proving the relevance and materiality of the documents sought.

Nor can the Board properly argue that it seeks so many documents that it is unable to prove the relevance of

any one document or any single group of documents, for the Board prepared and issued the subpoenas, and the Board must justify and support its own actions in preparing and issuing the subpoenas as written. It has been shown heretofore that the Board was at all times entitled to inspect substantially all of the documents sought in the subpoenas and has, in fact, examined many of the documents sought in the administrative subpoenas (*supra* pp. 13-14). It even has been proved that the Board has in its possession many of the documents sought in the administrative subpoenas (*supra,* pp. 15-16). In the face of these showings, surely the Board is in a position to and should be required to prove relevance and materiality of the documents sought in its subpoenas.

The Memorandum for Order of the District Court, which was the basis for the final order appealed from in this proceeding, provides in part as follows:

> "In laying the subpoenas alongside the charges in the Complaint, this Court cannot say that any of the documents or things called for in any of the subpoenas are immaterial or irrelevant to the proceedings before the Board, without an examination of all of the documents and things themselves, which this Court is not called upon to do at this stage of the proceedings."

The District Court found that it could not say that any of the documents called for in the subpoenas are immaterial or irrelevant. The District Court specifically did not find that any of the documents were material or relevant. This is more than a technical difference. Absent a finding that each document or each group of documents sought in the subpoenas are relevant and material, the subpoenas cannot be enforced. *Goodyear Tire & Rub-*

ber Co. v. National Labor Relations Board, supra; Bowles v. Cherokee Textile Mills, 61 Fed. Supp. 584 (D. C.-E. D. Tenn., 1945).

Section 644(b) of the Act outlines the subpoena power of the Board:

> ". . . the Board shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents *relating to any matter under investigation.*" (Emphasis supplied.)

As was stated in the *Goodyear* case, where a similar statute was construed, it is "not difficult here to decide what the 'matter [under investigation]' is with relation to which these subpoenas are asked. It is neither the structure nor the commercial history of the company, . . ." 122 F. 2d 453. The issues in the administrative proceeding do not relate to the structure or the commercial history of the respondents in Docket 6908. The issues instead are limited to the charges raised in the Board's complaint in Docket 6908.

E. The Subpoenas Constitute a General Fishing Expedition.

An examination of the subpoenas themselves reveals that there has been no attempt to limit the demand for documents to those relating to the issues in Docket 6908. Instead, demand has been made for all of the financial, corporate and operating documents used and maintained by the respondents in Docket 6908. The Board's obvious purpose in drawing up and issuing these subpoenas was to require the appellants to produce all of the documents of the respondents in the foregoing categories in the hope that some evidence will turn up.

The importance of the word "evidence" was stressed by Mr. Justice Holmes in *Federal Trade Commission v. American Tobacco Co.,* 264 U. S. 298 (1924), where a statutory provision virtually identical to the one contained in the Act empowered the Federal Trade Commission to issue subpoenas and to have them enforced by the courts. Justice Holmes stated, at 264 U. S. 306, as follows:

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it."

The decision in the *American Tobacco* case and the language of Justice Holmes have application to the instant case. Here the Board has issued sweeping subpoenas and upon objection by the appellants, the Board comes forward with its Complaint in the administrative proceeding and say, in effect, "this Complaint shows the relevance of each and every document sought in the subpoenas." This is not a showing that the documents are evidence; the Board's demand instead is for all documents not such documents as are evidence. Under the doctrine of the *American Tobacco* case and the *Goodyear* case, the courts will not countenance such actions and will decline to enforce administrative subpoenas possessing these objectionable features.

F. Subject Matter Has Not Been Specified.

The subject matter of the documents sought in the administrative subpoenas must be spelled out or the courts will deny enforcement of the administrative subpoenas. *Hale v. Henkel, supra; cf., Brown v. United States,* 276 U. S. 134, 143 (1928). The parts of *subpoenas duces tecum* which state the subject matter of the documents sought, are sometimes enforced, while the parts of the same *subpoenas duces tecum* which do not, are denied enforcement.[7]

G. Subpoenas Issued in an Adversary Administrative Proceeding Must Be Strictly Limited.

Administrative agencies have greater latitude where subpoenas are issued during the course of an exploratory investigation than where subpoenas are issued in an adversary administrative proceeding. In the latter case, the subpoenas are limited and restricted by the issues in the administrative proceeding. This Court recognized this distinction in *Hagen v. Porter,* 156 F. 2d 362 (C. A. 9, 1946). There the administrative subpoena was issued in the course of an investigation to determine whether the respondents had complied with the Emergency Price Control Act and the Administrator's regulations. There were no charges pending against the respondents.

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[7]*United States v. Medical Society of District of Columbia,* 26 Fed. Supp. 55 (D.C.-D.C., 1938); *403-411 East 65th Street Corporation v. Ford Motor Company,* 27 Fed. Supp. 37, 38 (D.C.-S.D. N. Y., 1939).

This Court enforced the administrative subpoenas in *Hagen v. Porter,* and stated, at 156 F. 2d 365, as follows:

> ". . . the standards of materiality or relevancy are far less rigid in an *ex parte* inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceeding."

This administrative proceeding, where the Board seeks to revoke the licenses of Great Lakes and Currey, is clearly a "trial or adversary proceeding" and the permissible breadth of the administrative subpoenas should be limited accordingly. The respondents in *Hagen v. Porter, supra,* also refused to permit the agency to make investigations and inspections while, on the other hand, these appellants have suffered and permitted unrestricted access to and inspection of the documents sought in the administrative subpoenas by the Board. [R. 129-142.]

II.

Personal Income Tax Returns Need Not Be Produced.

Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith[8] are required to produce copies of all personal income tax returns for the calendar or fiscal years 1951 through 1954. [R. 40, 45, 48.] The appellants strongly object to furnishing their personal income tax returns. [R. 114.] While the District Court did not include personal income tax returns in its Inspection Order of April 7, 1955, nevertheless these personal income tax returns were included in the final Order of the District Court Enforcing Subpoenas. The Board made no showing whatsoever of any particular evidentiary need for these personal income tax returns and made no showing

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[8]Robert M. Smith is not a Respondent in Docket 6908.

of their relevance and materiality or the relevance and materiality of any income tax return of any of these three individuals for any particular year. The Board relied, instead, upon the issues in the administrative proceeding presented in the pleadings.

We do not claim that personal income tax returns are privileged and cannot be the subject of an administrative subpoena. However, the courts have generally refused to require the production of copies of personal income tax returns under the broad discovery provisions of Rule 34 of the Rules of Civil Procedure, although the courts have otherwise shown great liberality in requiring the production of documents pursuant to this Rule.[9]

The language of the Court in *Garrett v. Faust,* appearing at 8 F. R. D. 557, has particular application to the instant case:

> ". . . I feel that *with all the information that plaintiffs have at their command, and the opportunities they have had to obtain it,* I cannot in good conscience require defendants to submit their income tax returns for copying. I realize that income tax returns may not be privileged within the meaning of Rule 26 . . . but I am not too disposed to require a person to display their contents to the party suing him." (Emphasis supplied.)

Here the Board has had ample opportunity to obtain the information sought through its inspection powers and its actual inspection of the documents pursuant to the

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[9]*Jacobs v. Kennedy Van Saun,* 12 F. R. D. 523 (D. C.-M. D., Pa., 1952); *United Motion Theatre Co. v. Eland,* 199 F. 2d 371 (C. A. 6, 1952); *Garrett v. Faust,* 8 F. R. D. 556 (D. C.-E. D., Pa., 1949); *Isrel v. Shapiro,* 3 F. R. D. 175 (D. C.-S. D., N. Y., 1942); *Welty v. Clute,* 2 F. R. D. 429 (D. C.-W. D., N. Y., 1939).

District Court's Inspection Order of April 7, 1955. The fact that the information may become available to the Board through the other subpoenas at issue in this proceeding, or through other sections of the subpoenas served upon Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith, also strongly militates against enforcement of provisions of the subpoenas calling for the personal income tax returns of these three individuals.[10]

The Supreme Court has refused to require the production of documents in a closely analogous situation where the documents sought were the "work product" of counsel. The court held that the documents sought were neither privileged nor irrelevant. However, in refusing to order production of the documents, the Supreme Court laid down the principle that there must be a showing that the same information cannot be made available by the production of other documents or ". . . direct from the witnesses for the asking." *Hickman v. Taylor,* 329 U. S. 495, 508 (1947).

The Board, as has previously been noted, made no particular showing of its evidentiary need for or the materiality or relevance of any personal income tax returns. The Board also has failed to show that the same information cannot be made available by the production of other documents or "direct from the witnesses for the asking" and should be required to do so since it appears that the same information is readily available from these sources.

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[10]*Garrett v. Faust, supra; O'Connell v. Olsen & Ugelstadt,* 10 F. R. D. 142, 143 (D. C.-N. D., Ohio, 1949); *Maddox v. Wright,* 103 Fed. Supp. 400 (D. C.-D. C., 1952).

III.

The District Court Has Misconceived Its Function and Has Failed to Discharge the Duties and Responsibilities of a Trial Court in an Administrative Subpoena Enforcement Case.

It is well settled that the courts in subpoena enforcement cases do not act as mere *automata* or serve as administrative adjuncts. Although Congress has granted administrative agencies the power to issue subpoenas, it has withheld from them the power to enforce their subpoenas. This power was delegated to the federal courts. *Interstate Commerce Commission v. Brimson,* 154 U. S. 447, 485 (1894), where it is stated:

> "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

In a subpoena enforcement case, "courts act as courts and not as administrative adjuncts," and they discharge "judicial power with all the implications of the judicial function in our constitutional scheme," Justice Frankfurter dissenting in *Penfield Co. of California v. Securities and Exchange Commission,* 330 U. S. 585, 604 (1947).

The trial court in a subpoena enforcement case cannot throw up its hands and say that it is unable to determine whether the documents sought in the administrative subpoenas are relevant and material to the issues in the administrative proceeding. *Goodyear Tire and Rubber*

Co. v. National Labor Relations Board, supra; Bowles v. Cherokee Textile Mills, supra. This is precisely the action taken by the District Court as shown in its Memorandum for Order Enforcing Subpoenas (*supra,* p. 18). The issue of relevance and materiality of the documents sought must be decided by the court, and the burden of proving relevance and materiality rests upon the Board, the proponent of the subpoenas (*supra,* pp. 16-19). The District Court should have required the Board to come forward with proof of relevance and materiality, or, in the absence of such proof from the Board, dismissed this action upon the merits.

The decisions relied upon by the Board in support of its position are concerned with disputes over "coverage" of the regulatory statute.[11] The distinction between "coverage" cases and cases concerned with the validity of administrative subpoenas is readily apparent. The former is properly committed to the expertise of administrative agencies, while the latter is peculiarly a judicial question. The Civil Aeronautics Board is not expert on the allowable breadth of *subpoenas duces tecum.* Nevertheless, the District Court "rubber stamped" the Board's predetermination of relevance and materiality since the District Court apparently was unable or unwilling to decide these basic issues itself.

The District Court failed or refused to consider the possibility of enforcing the subpoenas, or some of them, in part, or, conversely of denying enforcement of some of the subpoenas in whole or in part. There are a number of cases where the subpoenas were considered to be too broad in scope and the court either quashed the sub-

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[11]See *Endicott-Johnson Corp. v. Perkins,* 317 U. S. 501 (1943); *Oklahoma Press Publishing Co. v. Walling,* 327 U. S. 186 (1946).

poenas in part or refused enforcement in part.[12] Administrative subpoenas will not be enforced precisely according to their terms and without modification if it appears that they are too broadly or oppressively drawn.[13] The court stated in *National Labor Relations Board v. Pesante, supra,* at 119 Fed. Supp. 458:

> "The Anchor Rome Mills case, *supra,* and the Jackson, case, *supra,* so heavily relied upon by the Board in other particulars, are authority for the proposition that if subpoenas are too broadly or oppressively drawn, it would be the duty of the court to prevent abuse of its process by denying enforcement of such subpoenas."

However, in some situations, the courts have refused to enforce subpoenas even in part.[14]

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[12]*Application of Linen Supply Companies, supra,* holding that the evidence sought bore no relation to the investigation; *In re Eastman Kodak,* 7 F. R. D. 760 (D. C.-W. D., N. Y., 1947), and cases collected at 7 F. R. D. 764; *United States v. Medical Association of the District of Columbia, supra; Application of Harry Alexander, Inc.,* 8 F. R. D. 559 (D. C.-S. D., N. Y., 1949). All of the foregoing cases involve grand jury investigations of antitrust violations.

[13]*Jackson Packing Co. v. National Labor Relations Board,* 204 F. 2d 842 (C. A. 5, 1953); *National Labor Relations Board v. Anchor Rome Mills, Inc.,* 197 F. 2d 447 (C. A. 5, 1952); *National Labor Relations Board v. Pesante,* 119 Fed. Supp. 444 (D. C.-S. D. Calif., 1954).

[14]*In re United Shoe Machinery Corporation,* 6 F. R. D. 347, 349 (D. C.-D. Mass., 1947), where the court held that the subpoenas under consideration were ". . . permeated with the invalid, broad and sweeping demand, and no cutting away or pruning of the bad parts is possible," and the court thereupon quashed the subpoena issued by the Grand Jury in its investigation of antitrust violations; *In re United Last Company,* 7 F. R. D. 759 (D. C.-Mass., 1947), where a subpoena calling for correspondence between two companies for a period of six years was quashed on the ground that it was oppressive and unreasonable in a terse, two-paragraph decision; *National Labor Relations Board v. Pesante, supra,* where 30 administrative subpoenas issued by the National Labor Relations Board were denied enforcement on the ground that each of the subpoenas was oppressive.

The subpoenas in this proceeding exceed the reasonable evidentiary requirements of the Board. Should the subpoenas be enforced at all, they must be limited to those documents required for the reasonable evidentiary needs of the Board.

Conclusion.

Upon the basis of the foregoing reasons and authorities, the order of the District Court should be reversed.

Respectfully submitted,

KEATINGE, ARNOLD & OLDER,

By ROLAND E. GINSBURG,

Attorneys for Appellants.

October, 1955.

APPENDIX.

TITLE 28 UNITED STATES CODE

"Sec. 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

FEDERAL RULES OF CIVIL PROCEDURE

"RULE 81.

"APPLICABILITY IN GENERAL

"* * *

"(a) To what proceedings applicable.

"(3) In proceedings under Title 9, U. S. C., relating to arbitration, or under the Act of May 20, 1926, c. 347, Sec. 9 (44 Stat. 585), U. S. C., Title 45, Sec. 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

TITLE 49 UNITED STATES CODE

"Sec. 644. Evidence

"* * *

"(b) For the purposes of this chapter the Board shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under investigation. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

"(c) The attendance of witnesses, and the production of books, papers, and documents, may be required from any place in the United States, at any designated place of hearing. In case of disobedience to a subpeona, the Board, or any party to a proceeding before the Board, may invoke the aid of any court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this section.

"(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpeona issued to any person, issue an order requiring such person to appear before the Board (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

Great Lakes, Currey, Air International Inc., Great Lakes Airlines Agency, Inc., and Nevada Aero Trades, Company are called upon to produce the following docu-

ments for a 38-month period, commencing January 1, 1952 through February 25, ~~1952~~ 1955.[a]

1. *All* general ledgers and *all* subsidiary books and ledgers, and *all* vouchers, invoices, journals and other supporting documents to the entries in said books and ledgers.

2. *All* audit report, financial statements (balance sheets, schedules of cash receipts and disbursements, and profit and loss statement).

3. *All* minutes and notes of directors' and stockholders' meetings, stock record books and *all* stock certificates.

4. *All* bank statements and cancelled checks.

5. *All* income tax returns for the years 1951 through 1954, inclusive.

6. *All* correspondence, contracts, agreements and options between any of the nineteen (19) Respondents in Docket No. 6908 and between any of them and Robert M. Smith and Arthur R. Currey.[b]

7. *All* individual, personnel and payroll records and vouchers.

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[a]The Great Lakes documents were called for in the subpoenas served upon Appellants Ida Mae Hermann [R. 39-43], H. C. Richards [R. 54-55], George Patterson [R. 55-56] and Capt. G. D. Thompson. [R. 60.] The Currey documents were called for in the subpoenas served upon Appellants Robert M. Smith [R. 47-50]. H. C. Richards, George Patterson and Captain G. D. Thompson. The documents of Air International, Inc. and Nevada Aero Trades Company were also called for in the subpoena served upon Appellant Ida Mae Hermann. [R. 39-43.] The Great Lakes Airlines Agency, Inc. documents were called for in the subpoena served upon Appellant Irving E. Hermann. [R. 43-47.]

[b]All correspondence between Ida Mae Hermann and Irving E. Hermann, husband and wife, is included.

Great Lakes and Currey, the Air Carrier Respondents in Docket No. 6908, are called upon to produce the following additional documents for the same 38-month period, January 1, 1952 through February 25, 1955:[c]

8. Specimens of *all* handcards, brochures, schedules and other advertising material distributed to the public by Great Lakes, Currey and/or their ticket agents.

9. Specimens of each type of ticket and exchange order sold to the public during the years 1952 through 1954, inclusive, by Great Lakes, Currey and/or their ticket agents.

10. *All* flight, auditor and agent coupons taken from documents actually sold to the public by Great Lakes, Currey, and/or their ticket agents during the months of June and November for the years 1952 through 1954, inclusive.

11. Specimen copies of *all* advertisements subscribed for by, or on behalf of Great Lakes and Currey.

12. All flight personnal assignment sheets, aircraft scheduling sheets, operations manuals, operations specification sheets for aircraft identification (Form ACA-518A), and pilot rosters.

13. *All* contracts, agreements and memoranda related to lease of office, ticket counter and maintenance space and facilities.

14. Specific flight, auditor and agent ticket coupons used in connection with various flights in 1953 and 1954.

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[c]Except as hereinafter noted in paragraphs 9, 10, 14, 15, 16 and 17.

15. *All* flight personnel assignment sheets or charts and minutes of *all* pilot meetings since May 1, 1952.

16. For the period May 7, 1952, through March 9, 1955, the following:

a. *All* aircraft maintenance logs for aircraft owned or operated by Currey and Great Lakes;

b. *All* aircraft identification sheets (Form ACA-518A) prepared by or for Currey and Great Lakes;

c. *All* aircraft utilization sheets prepared by and/or for Currey and Great Lakes;

d. All aircraft lease agreements and correspondence and memoranda relating thereto for aircraft operated by Currey and Great Lakes.

17. All aircraft routing sheets, aircraft assignment sheets and ship distribution charts prepared and/or used by Great Lakes and Currey since May 1, 1952.

18. Great Lakes is also directed to produce all Bills of Sale, Chattel Mortgages, Certificates of Registration, and Leases reflecting chain of title of aircraft owned and/or operated by Great Lakes and Nevada Aero Trades Company for the same 38-month period.

19. Appellant M. B. Scott is directed to produce *all* correspondence (letters, telegrams, notes and memoranda) between M. B. Scott, Inc. and eighteen (18) of the Respondents in Docket No. 6908, and *all* correspondence, invoices, statements and insertion orders in which the said eighteen (18) Respondents

are mentioned and *all* ledger sheets in the possession of M. B. Scott, which contain information regarding transactions with any of the said eighteen (18) Respondents; and copies of *all* insertion orders for radio or television advertising and orders for the printing of brochures and other advertising materials placed with M. B. Scott, Inc. by any of the said eighteen (18) Respondents. There is no time limitation or restriction whatsoever pertaining to the M. B. Scott subpoena. [R. 51-53.]

20. Appellant Orville Kelman is directed to produce *all* correspondence, contracts, agreements, memoranda, work papers and audit reports relating to the nineteen (19) Respondents in Docket No. 6908, since May 1, 1952. [R. 58-59.]

21. Appellant Harold Shein is directed to produce the following records and documents of Respondent Skycoach Agency of San Francisco, Inc., and any other entities using the style "Skycoach," for the period January 1, 1952, through February 21, 1955, inclusive: Copies of *all* quarterly recapitulations of payrolls and payroll tax sheets, together with any notes or memoranda indicating to whom such copies were provided and *all* copies of weekly recapitulations of receipts or disbursement sheets with notes or memoranda indicating to whom such copies were provided. [R. 53-54.]

22. Appellants Ida Mae Hermann, Irving E. Hermann and Robert M. Smith also are directed to produce their respective personal income tax returns for the calendar or fiscal years 1951 through 1954. [R. 40, 45, 48.]